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Chairman: Mrs. FLORES (Uruguay)

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The meeting was called to order at 10.20 a.m.

AGENDA ITEM 143: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (continued) (A/48/10, A/48/170-S/25801 and A/48/303)

1. Mr. WATHELET (Belgium), speaking on behalf of the European Community and its member States, said that they had welcomed the International Law Commission's new mandate, conferred by the adoption of General Assembly resolution 47/33, to prepare as a matter of priority a draft statute for an international criminal court; they had reiterated that position in various forums, including at an international conference for the protection of victims of war held at Geneva from 30 August to 1 September 1993. They had also welcomed the establishment of an ad hoc tribunal for the prosecution of war crimes in the former Yugoslavia.

2. He commended the Working Group for its speed in drawing up the first version of the draft statute, which would be refined in the light of the views expressed in the debate and the comments of States. Lastly, he reiterated the support of the European Community and its member States for the Commission's work and urged the Commission to continue to give the draft statute top priority so that it could be completed in 1994.

3. Mr. MAWHINNEY (Canada) said that the goal of furthering peace and security between States and justice for individuals could be achieved only through legal instruments that were fair, effective and acceptable to all. Nowhere was the need for effective instruments more urgent than in the regulation of the use of force, whether political or military. His delegation therefore saluted the Working Group for its work on the draft statute for an international criminal court: it had given an old dream concrete form. Canada had supported the establishment of an international criminal court in the General Assembly and at the conference on that topic in Vancouver in March 1993. It would, nevertheless, state its position on a number of issues.

4. First, to be effective over time, the new court must legitimately represent the interests and convictions of the majority of Member States. The best way to confer legitimacy would be to make the court a judicial organ of the United Nations, as in the case of the International Court of Justice. It was also necessary to ensure the independence of its prosecutors. To that end, it should be stipulated that, once chosen by the States parties, they could not be removed from office by the judges as currently envisaged in article 15 of the draft statute, a provision that would expose them unnecessarily to political pressures. With regard to crimes subject to the court's jurisdiction, Canada agreed that they should be limited to those listed in article 22, which were already widely accepted by the international community, with the addition of reference to the Convention against Torture. Since the goal was for the greatest possible number of States to accept the court, Canada supported the first option for article 23: in other words, a mechanism that allowed States to accept the court's jurisdiction over specific crimes by positive declaration.

5. Secondly, with respect to the fairness of the proceedings, Canada believed that trials in absentia were contrary to the principles established in the International Covenant on Civil and Political Rights except in very limited and

(Mr. Mawhinney, Canada)

special cases, such as where an accused person absconded after the commencement of his or her trial. Canada also thought that it would be in the interest of the fairness of the proceedings to create an appeals chamber that was distinct from the trial chamber. Furthermore, the procuracy should be allowed to appeal sentences under certain circumstances, namely in the event of material errors in law or when the sentence was obviously disproportionate to the crime. In addition, provision should be made in article 51 to allow judges to express dissenting opinions.

6. Thirdly, with respect to the question of the effectiveness of the court's work, enforcing orders of the court, such as requests for assistance or the production of documents or persons, could pose constitutional problems for some States. For that reason, the Working Group should direct its attention to the diverse means by which States parties might give effect to the provisions in articles 4, 47, 48 and 58 (2) and should include reference thereto in the next draft. Lastly, recalling that an International Tribunal for the prosecution of war crimes committed in the former Yugoslavia had been established, he recommended that the members of the Working Group should pursue ongoing dialogue with the members of that Tribunal for the purpose of exchanging impressions and suggestions and avoiding duplication or contradiction. It was vital to make the statement, through the establishment of a permanent court, that no crimes against humanity or other international crimes would go unpunished.

7. Mrs. CHATOOR (Trinidad and Tobago), speaking on behalf of the 12 States members of the Caribbean Community (CARICOM), expressed continued support for the establishment of an international criminal court and recalled that, in 1993, the international community had decided to establish an ad hoc tribunal for the prosecution of serious violations of international humanitarian law in the former Yugoslavia.

8. With respect to the draft statute submitted by the International Law Commission and, specifically, the relationship of the proposed tribunal to the United Nations, the CARICOM countries believed that the tribunal should be a judicial organ of the United Nations; it should also be permanent, since that would foster the development of international criminal law and deter would-be international criminals. On the question of the qualifications of the judges, they supported the proposals contained in article 6 and wished to add that, initially, there was no need for the judges to be permanently located at the seat of the court. With regard to the election of judges, it was necessary to respect the principle of equitable geographical representation and to ensure that no region was overrepresented. Lastly, a limit should be placed on the accused's right to request the disqualification of judges in order to prevent him or her from seeking to disqualify all members of the court on spurious grounds. A pre-emptory challenge of two judges and a challenge of a maximum of two others for cause might be reasonable.

9. The procuracy should be as independent as possible and be insulated from any form of political pressure. In that regard, the possibility of the removal by the court of the prosecutor, the deputy prosecutor and the registrar appeared inconsistent but could be explained by the court's almost daily contact with those officials, which would allow it to evaluate better their conduct and effectiveness.

(Mrs. Chatoor, Trinidad and Tobago)

10. The CARICOM countries agreed in principle with the list of crimes defined by treaties appearing in article 22 in respect of which the court could have jurisdiction. However, they felt that it was also necessary to include in that article illicit trafficking in drugs across national frontiers, the laundering of drug money and the activities of narco-terrorists, which were grave threats to peace and security and to the integrity of States. Following careful examination of the provisions of article 23, on acceptance by States of jurisdiction over crimes listed in article 22, they pronounced themselves sympathetic to the "opting-out" system whereby a State, by becoming a party to the court's statute, would automatically confer jurisdiction on the court over the crimes in question, although States parties would have the right to exclude some crimes from such jurisdiction.

11. However, she would like to record that the contentious issue of the court's jurisdiction was still unresolved and that it might be necessary to determine whether the jurisdiction of the international court should have priority where competing jurisdictions were involved, such as that of the State of nationality of the victims, or that of the State where the act had occurred. That would have consequences as to where a trial should be prosecuted, the legal system in which the matter should be tried, the choice of law, and the constitutional requirement of the right to a fair trial.

12. The member States of CARICOM supported the proposal in article 37 for the establishment of chambers of the court. However, they believed that the selection of the judges to a chamber should be based on the most objective criteria possible; reliance on the decision of the three members of the bureau could be challenged by the parties in the matter. The court must determine that it had jurisdiction, which might in practice only be challenged by States with a direct interest in the case, although all States parties had the right to do so. On the question of the possibility of pre-trial challenges by the accused as to jurisdiction and/or sufficiency of the indictment, the statute should clearly provide for the possibility of the former type of challenge by the accused, since it could be that no State wished to make such a challenge. There should, however, be no pre-trial challenge as to the sufficiency of the indictment. It should be recalled that there were clear procedures in that connection, namely, the complaint was referred to the tribunal by a State, and the indictment was laid by the prosecutional organ and affirmed by the bureau or some other body acting as an indictment chamber. Moreover, the pre-trial challenge by the accused as to jurisdiction could be heard by the bureau.

13. If the square brackets in article 41 (a) were removed, the crime referred to in one or more of the treaties listed in article 22 would have to be a criminal offence in the State in which it occurred or of which the accused was a citizen. The disadvantage of that approach was that a State which decided not to make the treaty offence an offence under its domestic criminal law might provide a legal loophole, thus enabling the accused to avoid being tried either by a domestic court or by the international court. The text in square brackets should therefore be deleted.

14. On the question of trials in absentia, it would be preferable for an accused person to be present at his trial, as that would facilitate the court's

(Mrs. Chatoor, Trinidad and Tobago)

authority and effectiveness. An accused person could, however, be removed from the court for inappropriate conduct. Likewise, it would be difficult in some situations to bring the accused before the court; in such cases, the indictments could be prepared and States urged to use their good offices in that connection. Certain basic rules of evidence could be included in the court's statute, with detailed procedures being elaborated in the rules of the court. With regard to dissenting opinions, judges should be given the option to express them as a matter of conscience.

15. The States members of CARICOM had no objections to article 53. If a person was prosecuted under the court's statute for illicit trafficking in drugs or for the laundering of drug money, the assets confiscated should be made available to help in the fight against those offences, to rehabilitate drug addicts, or to help farmers in the planting of alternative crops.

16. As to appeal against judgement or sentence, the States members of CARICOM were of the view that the court's decisions should be final and not subject to appeal, as were the judgments of the International Court of Justice. Reopening of a case should be limited to situations where it was subsequently discovered that a key witness had perjured himself or herself or where new facts had been uncovered which could not have been discovered before or where a new witness had come forward. Although in principle it would be preferable that there should be no procedure for appeals, if there was a general consensus that an appellate procedure was an indispensable part of the administration of justice, such an appeal could be heard by all the judges of the court except for those who participated in the original trial.

17. The CARICOM States endorsed the provisions on international cooperation and judicial assistance. While States parties to the statute would have a special responsibility to cooperate with the court, States non-parties were not absolved from rendering any form of assistance that would ensure that the law was upheld. In addition, the International Law Commission might look into the question of juvenile offenders; the CARICOM countries would welcome the comments of other States on that issue.

18. As concerned the financing of the court, if the court became an organ of the United Nations its operational costs would be included in the regular budget of the Organization. However, the state of the finances of the United Nations must be taken into account. On the other hand, should the court be established by means of an international convention, the financial burden would fall only on States parties and could affect the court's effective functioning and even its very existence.

19. The CARICOM States were encouraged by the progress made towards the establishment of an international criminal jurisdiction and a permanent court. The Commission should be urged to complete the draft statute at its next session so that a final draft could be presented to the General Assembly at its forty-ninth session. The States Members of the United Nations had the responsibility to ensure that the court was established during the United Nations Decade of International Law and to provide it with the tools to make it an effective, impartial and operational body.

20. Mr. ROBINSON (Jamaica) said that the renewed impetus for the elaboration of a draft statute for an international criminal court was the result of an initiative taken four years earlier by Trinidad and Tobago, which, along with other small States, saw the establishment of such a court as the best way to bring to trial those who were profiting from drug trafficking and to solve a problem that could threaten their very existence. In general, his delegation supported the pragmatic approach taken by the Working Group in proposing the establishment of a court that was not a permanent, standing body that responded to the need to ensure the least expenditure consistent with fairness and effectiveness.

21. With regard to draft article 2, Jamaica did not believe it was either desirable or necessary that the tribunal should be a judicial organ of the United Nations. On the other hand, the tribunal should maintain a close cooperative relationship with the United Nations on the basis of a special agreement.

22. In regard to article 5, he said that only an unduly formalistic approach would lead to an objection to the court and the procuracy being organs of the tribunal on the ground that their independence would be prejudiced. In his opinion, in order to see whether their independence was compromised the actual powers or functions set out in the draft statute must be looked at. In regard to article 11, he found the word "feels" in paragraph 2 of the English text inappropriate, and also believed that paragraph 1 was sufficiently exhaustive of the grounds for the disqualification of a judge not to warrant the inclusion of the words "or for any other reason" in paragraph 2. The requirement in article 13, paragraph 2, that the prosecutor must have the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases would place at a disadvantage those prosecutors who came from systems in which the investigation of a crime was the task of the police rather than the prosecution. In Jamaica's opinion, the faculty to remove the prosecutor from office given by article 15, paragraph 2, compromised his independence. No matter how cumbersome the procedure, the prosecutor should only be removed by those who had appointed him, i.e. the States parties.

23. He had certain misgivings about part 2 of the draft statute, which was based on a distinction between a list of crimes defined in certain treaties specified in article 22, in respect of which the court might have jurisdiction, and others set out in article 26, which required that States should notify the registrar in writing that they specially consented to the court exercising jurisdiction. In his delegation's opinion, the distinction was spurious and, in any event, there was no basis for excluding from article 22 the crimes set out in the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Paragraph 1 of the commentary to article 22 referred to a standard that not all the crimes listed in that article met. Moreover, paragraph 5 of the commentary gave a misdirection in proclaiming that all treaties dealing with the combating of drug-related crimes could determine the court's jurisdiction under article 26. The different conventions should not be commingled, since not all contained the elements necessary for the offences to which they referred to be regarded as international crimes.

24. His delegation had examined five aspects of the question of whether a treaty established an international crime. Firstly, did the treaty constitute

(Mr. Robinson, Jamaica)

the offence as a crime under international law? Unlike the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the safety of Civil Aviation did not constitute the offences in question as international crimes and thus, in that respect, their position was the same as that of the 1988 Convention against Illicit Traffic in Narcotic Drugs. Secondly, did the treaty establish that the offence was punishable under domestic law? Both the conventions listed in article 22 and the 1988 Convention imposed that obligation on States parties. Thirdly, was there an obligation to take the necessary measures to establish jurisdiction over the offences created by the conventions, even though they had not been committed in the territory of the State party? In his delegation's opinion, that was an essential feature of an international crime, and the 1988 Convention, unlike the conventions on genocide and apartheid, met that condition. Fourthly, were there specific provisions requiring prosecution of an offender present in the territory of a State party that did not extradite him? The Convention against Illicit Traffic in Narcotic Drugs and the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation met the requirement. Fifthly, were there provisions for extradition and mutual legal assistance? Of the five aspects, that was perhaps the least certain guide as to whether a treaty established an international crime. However, the 1988 Convention had the most extensive provisions in that connection. He went on to refer to paragraph 2 of the commentary to article 22 to see whether the Convention against Illicit Traffic in Narcotic Drugs met the criteria indicated in it. The second criterion (the establishment of a system of universal jurisdiction) had already been examined; the first (that the crimes were themselves defined by the treaty concerned in such a way as to constitute a basic treaty law for possible direct application), was undoubtedly met by that convention.

25. There was an intrinsic and inevitable link between all those conventions aimed at the suppression of crimes and domestic law. In the first place, States parties were required to adopt the necessary legislative measures to make the offence a crime under their domestic law, so that if they did not extradite they could try the crime. The second link between the conventions and domestic law was that they all required States parties to take the necessary measures to establish jurisdiction in certain circumstances. Only then would their national courts be in a position to try the offender, a point which article 24, paragraph 1 (a), took into account. However, in that aspect also there were no differences between the Convention against Illicit Traffic in Narcotic Drugs and the civil aviation conventions. His delegation also had misgivings about the concept of a "basic treaty law" being applied by the court, in that it suggested that it was somehow desirable that the court should be in a position to try the offender without reference to domestic law. That approach was inconsistent with the scheme of the draft statute, and, in particular, with the provisions of its article 28, which created a unified approach to applicable law, so that the court could have recourse both to national law applied by domestic courts and to international practice.

(Mr. Robinson, Jamaica)

26. His delegation believed that the distinction between the two strands of jurisdiction under article 22 and article 26, paragraph 2 (b), should be eliminated. In any event, if the reference to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was retained, it should be placed in article 22.

27. The commentary to article 24, paragraph 1 (a), reflected the actual text of that provision, with the addition of the word "normally". In his delegation's views, that meant that it was not sufficient for a State to be a party to one of the treaties set out in article 22: it must have taken the necessary steps to establish jurisdiction over the offence in the circumstances set out in the relevant treaty so that it could try the offender. The meaning of the word "normally" in the commentary was unclear. Article 24, paragraph 2, also gave rise to doubts by perhaps giving undue weight to nationality.

28. His delegation had serious misgivings about article 25, which empowered the Security Council to refer cases to the court. Normally, it would be States parties which did so, pursuant to article 29, and it did not seem necessary for the Security Council to have that power. In any event, the General Assembly should receive similar treatment, since it was, after all, representative of the world community and had a wider range of functions than the Council, particularly in respect of human rights. His delegation believed that ascribing that power to the Assembly would be consistent with the main trend in the restructuring of the United Nations to meet the developments of the past decade. In the new world order, the newly-found effectiveness of the Security Council raised the question of the balance of powers in the Organization. For example, his delegation believed there was a need to elaborate guidelines for those decisions by the Council which, under Articles 24, 39 and 103 of the Charter, had the effect of nullifying States' rights and obligations under multilateral conventions. Some States might question the wisdom of undertaking an obligation under article 63 of the statute, to surrender persons to the court when the Security Council could adopt a decision calling for the surrender of that person to another body or to a State.

29. In any event, if article 25 was retained, the phrase "cases referred to in Articles 22 or 26 (2) (a)" should be amended, using the language of article 29.

30. The articles dealing with the situation following the affirmation of the indictment should be more closely aligned. For example, article 33, concerning the notification of the indictment required the States responsible for such notification to arrest the accused in certain circumstances. Article 63, entitled "Surrender of an accused person to the Tribunal", dealt with the arrest of an accused person. Thus both articles contained provisions obliging certain States to arrest the accused, which might be somewhat confusing. His delegation also questioned the need for a separate phase of notification of the indictment to the accused person.

31. There was an important difference between the texts of articles 63 and 33. In his delegation's view, the formulation used in article 63 - "any State on whose territory the accused person may be found" - was the correct one, and the provisions of article 33 should be brought into line with it.

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32. Article 63 raised serious questions of treaty law. Could States parties to the statute which were also parties to an aut dedere aut judicare treaty be obliged to surrender a person to the court at the request of: (a) a State party to the treaty which was also a party to the statute and (b) a State party to the treaty which was not a party to the statute? The effects of the provisions of article 63 were the following: in situation (a) the State party to the statute could ignore it and surrender the accused to the court, thus complying with its obligations under the treaty by application of article 63 (4); in situation (b), however, the result would be totally different, since the State party to the statute could not surrender the accused to the court but would have to fulfil its treaty obligation to surrender him to the State that was a party to the treaty. The acceptability of article 63 would have to be tested against the law of treaties, in particular article 41 of the Vienna Convention on the Law of Treaties. It should be noted that the statute imposed a clear obligation on States to surrender an accused person in the circumstances set out in article 63. That provision was an example of the kind of primacy that the statute attributed to the court, which was also illustrated by article 58 on international cooperation and judicial assistance. That approach might be challenged by some States, which might question whether the court, notwithstanding its unique features, warranted such differential treatment.

33. Articles 33 and 36 appeared to be a fair response to the concern of some small States that trial and imprisonment of big drug barons in their territories might pose a threat to their security.

34. Article 41 (a) dealt with the important principle nullum crimen sine lege. It should be read in conjunction with article 24 (1) (a), which dealt with the jurisdiction of the court. The approach taken by the statute was consistent with the requirement in most of the conventions identified in article 22 that States parties should adopt the necessary measures to establish jurisdiction over the offence. What criminalized a particular offence, therefore, was not the treaty itself, but the implementation by a State party of its treaty obligation to adopt those measures. Therefore, the square brackets should be removed from the phrase "and its provisions had been made applicable in respect of the accused" in article 41 (a).

35. Mr. PUISSOCHET (France) referring to the draft statute for an international criminal tribunal, said that since the end of the Nürnberg trials, the debate surrounding an international criminal jurisdiction had taken an academic turn and a debatable approach. However, from 1990 onwards the increase in brutal local conflicts involving disregard for the law of war and humanitarian principles had aroused public opinion in many countries. Although it was true that barbarity had always existed, it was no less true that impunity for the guilty was no longer acceptable. Therefore, the establishment of an international criminal jurisdiction, although it would not fully satisfy those with the most exacting consciences, was a step forward in achieving respect for the rule of law and a better lot for the victims of the conflicts. The work begun years before by the International Law Commission to establish an international criminal jurisdiction was yielding its first results.

(Mr.Puissochet, France)

36. The year 1993 was a landmark year: the Security Council, in resolutions 808 (1993) and 827 (1993) had taken the initiative, unprecedented since the establishment of the United Nations, of establishing an International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The establishment of that tribunal, for which France had been one of the sponsors, represented the first fruits of the International Law Commission's labours. In view of the establishment of the International Tribunal for the former Yugoslavia, consideration should be given to the appropriateness of establishing a permanent international jurisdiction when experience showed that it was possible to set up a tribunal rapidly to deal with a particular conflict. If necessary, the Security Council could act almost immediately on the basis of the Statute of the Tribunal for the former Yugoslavia or using another statute as a model. In that regard, France considered it excessive and unfair for special courts to be suspected of failing to adhere to standards of objectivity and impartiality simply because they had been a preferred tool of despotic regimes. On the contrary, such an innovative and revolutionary institution could only be successful if it met a need of the victims of crimes resulting from international conflicts and of an increasingly demanding world public opinion. Instituting a permanent and effective international criminal jurisdiction would require several attempts, which would not always yield satisfactory results. For the time being, therefore, the debate between the advocates of a permanent jurisdiction and those of a special occasional court could not be resolved.

37. Turning to the nature and structure of the tribunal specifically, he said it would be preferable for the institution to be semi-permanent and closely linked to the United Nations, with flexible and low-cost structures. An institution of that type could only be established under a treaty. The Security Council, as part of its peacemaking powers, had established an ad hoc international tribunal for the former Yugoslavia; however, it was difficult to conceive of the United Nations having the competence to establish a permanent jurisdiction of a universal character. In that connection he disagreed with those members of the Working Group who believed that Articles 22 and 29 of the Charter of the United Nations, on the establishment of "subsidiary organs", or the joint implementation of Articles 10 and 24 of the Charter, provided a sufficient legal basis for the General Assembly, the Security Council, or both, to establish a permanent tribunal.

38. Since the Charter of the United Nations did not contain any provisions empowering either the Security Council or the General Assembly to institute an international criminal tribunal, the Working Group had had the good judgement to consider once again the possibility of using a specific treaty. Such an approach raised many concrete problems. The tribunal would never have a universal character if it were established under a treaty. The treaty would be ratified only by those States that respected international law and humanitarian law and by those whose impeccable past or present provided a guarantee that they would adhere to the values of justice. States that had recently been the subject of legal proceedings and States located in areas of conflict, on the contrary, would not easily accede to the treaty. There was a risk of forming a "good States club" under a treaty and leaving the tribunal little to judge.

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That would be a complete failure to countries like France, which believed in good faith that the establishment of an international criminal jurisdiction met the needs of the modern era. There was also the issue of the relationship between the tribunal and the United Nations. Given the silence of the Charter on that issue, it would be difficult for the tribunal to be an organ of the United Nations, although it would be appropriate for it to be closely linked to the Organization for two reasons: first, because given its limited structure, it would have to use the administrative infrastructure of the United Nations, and second, because the tribunal's activities would be closely linked to those of the peace-keeping and peacemaking organs, since it would be dealing with violations of the law of war and of humanitarian law. It was therefore desirable to have functional and organic links between the tribunal and the principal United Nations agencies, so that both might exercise complementary activities aimed at achieving a single objective: the prevention of conflicts, respect for humanitarian law and the restoration of peace. The text of articles 25 and 27 of the draft statute took that approach.

39. The Tribunal must also be closely linked to the United Nations in order to benefit from the universal character of the Organization. The method of appointing members of the International Tribunal for the former Yugoslavia was very appropriate as far as representativeness was concerned. Since the members of that Tribunal were proposed by the Security Council and elected by the General Assembly, they undoubtedly represented the international community in all its diversity.

40. Concerning the election of judges, possible options would obviously be limited if it was decided to establish the tribunal through a treaty. As the treaty would be binding only on States that were parties to it, it would be inevitable to envisage, as the Special Rapporteur had done, that the judges would be appointed by their respective Governments. Moreover, that system would not give the tribunal the same representativeness as the International Tribunal for the former Yugoslavia. The proposals of the Working Group that the States parties should elect the 18 judges of the court and leave open the discussion on the composition of the chambers showed greater concern for establishing a transparent and democratic procedure. However, he was not convinced that such a method of appointment met all the objections raised. The proposed court would be respected only if it was composed of judges that the community of States and public opinion deemed to be their legitimate representatives and if it operated in close coordination with the Security Council; moreover, such a court must be able to act promptly and efficiently whenever international public opinion called for justice. Should the judges be selected from a limited geographical and political pool and should the requirements of universality, transparency and democracy be unduly ignored, the court would fall short of expectations and even the very concept of an international criminal jurisdiction would be discredited.

41. The jurisdiction ratione materiae of the court posed a delicate problem since, as the Special Rapporteur had noted, no agreement had been reached on a list of crimes to form the subject of such jurisdiction. For that reason, pending a code of crimes one solution would be for the subject-matter jurisdiction of the court to be established by special agreements between States parties, or by individual acceptance, such instruments being subject to implementation at any time. In that connection, France considered it

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indispensable that the question of the code of crimes against the peace and security of mankind should be examined separately from the question of the statute of the tribunal since, unlike the draft statute, the current version of the draft code of crimes was very controversial and consequently, no agreement might be reached on it for a long time to come.

42. In principle, the idea of defining the court's jurisdiction in terms of the conventions in force seemed a sound one. Nevertheless, only instruments relating to crimes that outraged humanity should be considered. The four Geneva Conventions of 1949, which had been ratified by nearly all States, and in particular the fourth, the Geneva Convention relative to the Protection of Civilians Persons in Time of War, should form the basis for the preparation of the list of such instruments. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide should also be included. The list must not be longer, since the aforementioned Conventions were the only ones that enjoyed the general support of all States and basically covered crimes that appalled international public opinion. He did not completely agree with the inclusion of other instruments in draft article 22 since they did not enjoy general support and the international judicial cooperation that they established was usually sufficient to guarantee that justice would be served.

43. A distinction should be made between acceptance of the statute of the tribunal and acceptance of the court's jurisdiction, which should be the subject of a separate optional instrument in order to allow States to indicate the crimes in respect of which they accepted the court's jurisdiction. Obviously, that question would not arise in the same terms if the definition of the court's jurisdiction covered only the short list comprising the four Geneva Conventions and the Convention on Genocide.

44. He questioned the soundness of article 26 which allowed States to confer jurisdiction on the court in respect both of any violation of customary international law that might give rise to the criminal responsibility of individuals and of drug-related crimes. It would be preferable for the court to have jurisdiction only over matters relating to non-compliance with international conventions, without including customary international law, since criminal penalties could only be justified when a written law approved by a parliament existed. While the idea of allowing the Security Council to submit to the court certain cases involving violations of customary international law was interesting, it raised problems that should be given further consideration.

45. He shared the view that the court should not be given jurisdiction over drug trafficking. While France was perfectly aware of the urgent need to suppress drug trafficking and to intensify international cooperation in that regard, it felt that crimes arising out of drug trafficking could not be put on the same footing as the crime of genocide and the most horrendous violations of the law of war and humanitarian law.

46. He agreed with the Special Rapporteur and the International Law Commission that the jurisdiction ratione personae of the court should be confined to individuals and that the court should not be able to try either States or international organizations. However, draft article 27 defined the crime of aggression and stipulated that the Security Council must first determine that

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the State concerned had committed the act of aggression which was the subject of the charge. The vague wording of that article showed how ambiguous the concept was. Logically, that crime could only be committed by States and not by individuals and he therefore suggested that the formulas used for the establishment of the International Tribunal of Nürnberg should be used.

47. Regarding the determination of the jurisdiction of the court over individuals under article 22, the Special Rapporteur had provided in his report that such jurisdiction would depend on the consent of two States: the State in which the crime had been committed and the State of which the perpetrator of the crime was presumed to be a national. The debate had revealed the fear of some members that the efficiency of the court would thereby be considerably impaired. According to his delegation, various States were involved: the State in whose territory the crime had been committed, the State of which the perpetrator of the crime was presumed to be a national and the State of which the victims of the crime were nationals. Two contradictory interests had to be reconciled: the need to avoid a situation whereby a State would oppose its own jurisdiction to that of the court with the sole aim of protecting one of its nationals, and the need to ensure that some States were not deprived of the possibility of exercising their jurisdiction under existing conventions. The current version of the text, which only partly reflected those concerns, should be carefully considered in the light of the solutions chosen in the case of the International Tribunal for the former Yugoslavia.

48. With respect to the question of applicable law, the Special Rapporteur had wisely abided by the recommendations of the Working Group, which considered that such law could derive only from treaties in force. In the current text of article 28, the rules and principles of general international law were acceptable. In that respect, by virtue of the principle nullum crimen sine lege, international criminal law should not embrace custom; it was hard to imagine any applicable rule of international law that would not be included in the statute or in the treaties. Furthermore, the reference made to any applicable rule of national law as a subsidiary source was surprising, although no doubt that could be useful for the ranking of penalties, a question addressed in another article of the draft.

49. As to the commencement of prosecution, the Working Group had rightly not retained the formulation that would have permitted any State to submit a complaint. In article 29, that right was limited to those States with jurisdiction over a particular crime and having accepted the jurisdiction of the court in that matter. Furthermore, it would be useful to allow the Security Council to refer matters to the court.

50. Investigation was an essential element of the statute, since, most of the time the major function of the court would consist in investigating criminal acts and not in punishing the guilty. In order to give satisfaction to the victims and to public opinion, a methodical, scrupulous and impartial investigation was more important than the resulting punishment. It was therefore regrettable that no provision had been made for an investigation organ independent of the judicial organ and that the Special Rapporteur, in opposition to the inquisitorial system, had made some overemphatic comments in paragraph 49 of the report. An energetic and active procuracy directed by an independent

(Mr. Puissochet, France)

prosecutor would certainly help to remedy the lack of an investigation organ. It was therefore a positive step that the Working Group had rejected the idea of entrusting indictment to the State that submitted the complaint.

51. Trial in absentia must not be excluded. Many suspects would find the means to remove themselves from the court's jurisdiction and their absence could paralyse the proceedings, which would deprive victims of even the right to make the charges public and the right to have the truth established. It must be borne in mind, however, that some legal systems did not permit trial in absentia. In the French delegation's opinion, the right of the accused to be present at his trial should not allow him or the authorities with jurisdiction over him to prevent the trial from being held. If, as was desirable, the statute permitted the court to hear cases in absentia, appropriate time-limits and guarantees could be established. Moreover, without doubt the court's decision would be overturned if the suspect was arrested or appeared voluntarily before the court, which would have to retry the case.

52. The principles formulated with regard to a double degree of jurisdiction were interesting; however, the grounds for appeal were too broad, which could lead to the systematic resort to that recourse. An appeals procedure limited to errors of law and procedure should be established, which would be more in keeping with the simplicity sought by the Special Rapporteur.

53. Mr. DEL MAR (Philippines) said that the report of the Working Group on a draft statute for an international criminal court was a substantive contribution, and his delegation intended only to make some preliminary comments. It supported the re-establishment of the Working Group, which should continue its work, taking into account the opinions expressed by States in the General Assembly, in order to obtain the necessary consensus on the establishment of the court.

54. The consideration of the question of an international criminal jurisdiction and the draft statute should be guided by the principle of realism. It was essential to focus on those formulations which could elicit broad consensus among the members of the international community. At the forty-sixth session of the General Assembly, his country had expressed its reluctance to consider the matter, in the absence of a clear, organized and coherent consensus on the need for the court, on its powers and jurisdiction and on its precise role in relation to national courts. The Philippines had also indicated that more attention must be paid to concrete acts and examples of international agreement and cooperation in law enforcement because such precedents could assist in bringing about the consensus required in order to establish the court. At the forty-seventh session, the Philippines had joined the consensus in requesting the International Law Commission to undertake the elaboration of the draft statute.

55. As a general principle, the Philippines supported the establishment of an international criminal court for the prosecution and conviction of perpetrators of crimes with an international character, but felt that it would be possible only if there was consensus among the members of the international community. Such a court should meet the following standards: it must be legitimate and effective and must fulfil a role that so far had not been filled by domestic

(Mr. Del Mar, Philippines)

courts or mechanisms for international cooperation; it should not impair the current level of such cooperation, and it should comply with the fundamental standards of due process and fairness unimpaired by the political considerations of individual Governments. The proposals made for the statute must be carefully reviewed in order to determine whether they met those standards. To that effect, the ad hoc tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 could provide some useful lessons.

56. The Philippines wished to state its position on a number of issues. It shared the concerns of the United States about the legal theory that the international criminal court could be deemed, for purposes of surrender of the nationals of a country, to be an extension of that country's courts; moreover, like the United States, it also had a number of reservations with respect to the draft Code of Crimes. It agreed with Australia and the Nordic countries that it was important to detach the statute of the court from the draft Code, and that the court should be established as a facility to be called on when needed, rather than as a standing, full-time body. It was important to reflect in the statute that the jurisdiction of the court should be confined, at least initially, to individuals and should not extend to States, and that its jurisdiction should be essentially voluntary and concurrent with that of national courts. Lastly, in view of the need for the United Nations to be accountable to Member States for the use of its resources, the financial implications of the establishment of the court should be reviewed. Moreover, account must be taken both of the level of priority to be assigned to the court in a ranking of the legitimate needs of the international community and of the fact that the court's establishment represented an opportunity cost to the detriment of other projects that could be pursued.

57. Mr. JACOVIDES (Cyprus) said that the report of the International Law Commission on the work of its forty-fifth session (A/48/10) was excellent. He noted that paragraphs 13 to 20 of the report gave a general description of the questions discussed during the session. He would focus his comments on the debate on the draft Code of Crimes against the Peace and Security of Mankind, particularly, the question of the international criminal court. It was his understanding that the task of the Sixth Committee was to give the General Assembly guidance and policy direction rather than to concern itself with problems of detail or drafting, matters which lay primarily within the province of the Commission, which had been given a clear mandate in that area.

58. Referring to the topic of the draft Code of Crimes, discussed in chapter II of the Commission's report, and to the report of the Working Group on the statute for an international criminal court, he recalled that, from the beginning, his delegation had supported that topic. Such a legal instrument should be given its rightful place in current public international law. Acceptance of the Code could and should serve the important purpose of deterrence and punishment for the violators of its provisions. In order to ensure the broadest possible acceptance and effectiveness, the Code should encompass well-understood and legally definable crimes. That could best be achieved if the Commission took a closer look at certain aspects which might admit of re-examination in the light of the comments and observations of Governments.

(Mr. Jacovides, Cyprus)

59. In recent years, it had become increasingly clear that there was growing support for the idea that a permanent institution must be established in addition to the ad hoc tribunals set up for particular situations. It was therefore gratifying that the Commission had not shirked its responsibilities in that important field and had responded fairly rapidly by elaborating the draft statute.

60. Although many would have preferred the proposed court to have compulsory, exclusive jurisdiction, tied to an improved, more effective Code of Crimes against the Peace and Security of Mankind, lawmaking, at the international level was the art of the possible and compromise was necessary when circumstances so required. The results achieved were certainly an important first step towards the establishment of a permanent international criminal court and left the door open for further improvement and expansion when the criminal jurisdiction had been established and proved its worth.

61. Referring to pending issues, he said that his delegation believed that the court should be a permanent organ of the United Nations, even though it would sit only when a case was submitted to it. The president of the court should also be permanently appointed. As to the jurisdiction of the court, it should not be unduly restrictive and, in addition to crimes defined by treaties, should include "crimes under general international law" and, where appropriate, under national law. The Security Council and, where appropriate, the General Assembly should be authorized to bring certain crimes before the court. There might be good reasons for accepting jurisdiction in absentia in a limited number of cases. Lastly, the right of appeal and review of judgements should be recognized and the usual guarantees of a fair trial should be given. His delegation supported alternative B in draft article 23.

62. Although there were still unresolved issues, his delegation was confident that the obstacles could be overcome and the draft would be adopted before the fiftieth anniversary of the United Nations as a major contribution by the Commission to the United Nations Decade of International Law.

63. Referring to the topic of State responsibility, he said that his delegation supported the adoption of an effective and expeditious binding third-party dispute settlement procedure as part of a future State responsibility convention. He reaffirmed that Cyprus attached great importance to the early conclusion of the Commission's work on that topic.

64. Mr. HARPER (United States of America), referring to the draft statute for an international criminal court, contained in the report of the International Law Commission (A/48/10), said that his Government was firmly committed to the fight against international crime in all its forms. That was demonstrated by its active participation in all debates held on international cooperation in that area, and the fact that it maintained bilateral and multilateral relations concerning cooperation in the field of criminal justice and was a party to numerous treaties on extradition and legal assistance in criminal matters. Lastly, it had cooperated in international efforts to curtail illicit drug trafficking, money laundering, organized crime and terrorism.

(Mr. Harper, United States)

65. In May 1993 the Security Council had established an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. His delegation had been a major proponent of the tribunal, an unprecedented mechanism which had gained wide support, in part because it had been carefully geared to addressing a specific situation. The same level of care must be taken with all other mechanisms established in the field of criminal justice.

66. In general, his delegation believed that the concept of an international criminal court, despite its underlying difficulties which must be appropriately resolved, was an important one whose consideration should be continued. Obviously in certain instances egregious violations of international law might go unpunished for lack of an effective national forum for prosecution. It must also be recognized that the process of establishing ad hoc tribunals was time-consuming and could diminish the capacity for prompt action in such cases.

67. His Government continued to study the draft statute elaborated in 1992 by the Working Group and was prepared to participate constructively in future work and to cooperate in seeking solutions to key issues. Concerning the draft itself, particular attention must be focused on the question of the court's subject-matter jurisdiction. His delegation was not yet convinced that the category of "crimes under international law" was sufficiently well-defined or widely accepted to form the basis for the jurisdiction of an international criminal court. Consideration must also be given to whether drug-related crimes and crimes committed by terrorists would be more effectively prosecuted by an international court than by national courts. His delegation was also concerned about how the court would relate to existing status-of-forces agreements, the prosecution of war crimes and other military matters.

68. In another vein, under the current proposal, many States which had a legitimate interest in a particular case might have no role in deciding whether that case should be tried by the international court or by national courts and the trial might proceed without their consent. Without suggesting that all such States must give their consent or otherwise accept the jurisdiction of the court over the particular crime, his delegation believed that further review of the issue was warranted, considering that certain cases might be initiated by the Security Council.

69. Thought must also be given to how the international criminal court would affect relations derived from extradition treaties. His country was a party to many such bilateral treaties, whose purposes must not be thwarted. Thus, consideration must be given to whether a request for the surrender of an accused person to the court should really take precedence over a properly formulated request for extradition under a treaty. In that connection, the provision concerning the immediate arrest and surrender of the accused person might be inconsistent with the requirement for a judicial hearing, which, in the United States and other States as well, was a constitutional issue.

70. The statute must be consistent with international standards for due process and human rights. To a large degree, the Working Group had taken those concerns into account. At the same time, the draft made no provision for a true "appeal"

(Mr. Harper, United States)

to a separate group of judges, a lacuna which should be filled. The budgetary pressures on the United Nations must also be taken into account with a view to establishing an acceptable mechanism in that regard.

71. The full support of the international community would be crucial to the undertaking's success and, to that end, the fundamental issues relating to the establishment of the court must be satisfactorily resolved.

The meeting rose at 1 p.m.